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# FREEDOM OF MOVEMENT

## Human rights and population transfer

## Final report of the Special Rapporteur, Mr. Al-Khasawneh

CONTENTS

| | | Paragraphs | Page |
|---|---|---|---|
| Introduction | | 1 - 9 | 3 |
| I. | THE PHENOMENON OF POPULATION TRANSFER | 10 - 11 | 4 |
| II. | POPULATION TRANSFERS AND THE VIOLATION OF HUMAN RIGHTS | 12 - 18 | 5 |
| III. | TERRITORIAL CHANGES AND POPULATION TRANSFERS | 19 - 23 | 7 |
| IV. | STATE SUCCESSION, NATIONALITY AND POPULATION TRANSFERS | 24 - 36 | 8 |
| V. | MILITARY NECESSITY | 37 - 47 | 11 |

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CONTENTS (continued)


| | | Paragraphs | Page |
|---|---|---|---|
| VI. | POPULATION TRANSFERS AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS | 48 - 59 | 14 |
| VII. | REMEDIES | 60 - 63 | 17 |
| VIII. | CONCLUSIONS AND RECOMMENDATIONS OF THE EXPERT SEMINAR | 64 - 75 | 18 |

Annexes

| | | |
|---|---|---|
| I. | Human rights norms affected by population transfer and the implantation of settlers | 23 |
| II. | Draft declaration on population transfer and the implantation of settlers | 26 |

## Introduction

1. In resolution 1992/28 of 27 August 1992, the Sub-Commission entrusted Mr. Awn Shawkat Al-Khasawneh and Mr. Ribot Hatano, as Special Rapporteurs, with preparing a preliminary study on the human rights dimensions of population transfer, including the implantation of settlers and settlements, and requested them to examine, in the preliminary study, the policy and practice of population transfer, in the broadest sense, with a view to outlining the issues to be analysed in further reports, in particular the legal and human rights implications of population transfer and the application of existing human rights principles and instruments, and to submit the preliminary study to the Sub-Commission at its forty-fifth session.

2. This decision was endorsed by the Commission on Human Rights, at its forty-ninth session, in decision 1993/104 of 4 March 1993 and approved by the Economic and Social Council, by its decision 1993/228 of 28 July 1993.

3. In resolution 1993/34 of 25 August 1993, the Sub-Commission, at its forty-fifth session, took note with appreciation of the preliminary report on the human rights dimensions of population transfer, including the implantation of settlers and settlements (E/CN.4/Sub.2/1993/17 and Corr.1) submitted by Mr. Awn Shawkat Al-Khasawneh and Mr. Ribot Hatano, which found, inter alia, that population transfer is, prima facie, unlawful and violates a number of rights affirmed in human rights and humanitarian law for both transferred and receiving populations, and endorsed the conclusions and recommendations of the preliminary report. Furthermore, the Sub-Commission regretted that Mr. Hatano was unable to be further involved in the work on this subject as one of the Special Rapporteurs, and requested Mr. Al-Khasawneh, as Special Rapporteur, to continue the study on the human rights dimensions of population transfer, including the implantation of settlers and settlements, and to submit a progress report on the question to the Sub-Commission at its forty-sixth session.

4. In the same resolution the Sub-Commission invited the Commission on Human Rights, at its fiftieth session, to request the Secretary-General to organize a multidisciplinary expert seminar prior to the preparation of the final report, in order to formulate appropriate final conclusions and recommendations. At its fiftieth session, the Commission on Human Rights, noting Sub-Commission resolution 1993/34, adopted decision 1994/102 of 25 February 1994, in which it endorsed the resolution of the Sub-Commission.

5. The Economic and Social Council, in decision 1994/272, authorized the holding of an expert seminar on the human rights dimensions of population transfer, including the implantation of settlers and settlements, with a view to assisting the Special Rapporteur in preparing his final report.

6. Further to the recommendations made by the Special Rapporteur in the preliminary (E/CN.4/Sub.2/1993/17 and Corr.1) and progress (E/CN.4/Sub.2/1994/18 and Corr.1) reports, the purpose of the final report is to present the conclusions and recommendations of the expert seminar on population transfer and the implantation of settlers which was held at the

Palais des Nations in Geneva from 17 to 21 February 1997. The report also contains an analytical profile of some of the outstanding aspects of the problem of population transfer and the implantation of settlers.

7. Section I of the report sets out the views of the expert seminar on the phenomenon of population transfer and the implantation of settlers while section II offers the findings of the seminar on the principles violated by population transfer and the human rights standards which population transfers and the implantation of settlers violate. The expert group drew up a table of human rights norms affected by population transfer and the implantation of settlers and a draft declaration on population transfer and the implantation of settlers which are annexed to this report.

8. Consideration is given in section III to some of the outstanding issues concerning the impact of territorial changes on population transfers and the implantation of settlers. This theme is followed up in section IV in the context of nationality and State succession upon the dissolution of States. Section V examines the problem of military necessity in relation to the transfer of populations and the implantation of settlers.

9. In section VI, attention is paid to the violation of economic, social and cultural rights in instances of population transfer, including subtle and incremental population transfers and the implantation of settlers resulting from the denial of economic, social and cultural rights. Section VII indicates the civil remedies appropriate to situations of population transfer and the implantation of settlers. Finally, section VIII provides the conclusions and recommendations of the expert seminar.

## I. THE PHENOMENON OF POPULATION TRANSFER

10. According to the expert group, population transfer and the implantation of settlers violate international law as developed when they meet one or more of the following criteria:

(a) They are collective in nature, affecting a group of persons. The population transfers can involve large numbers of people in a single event or they can be gradual, incremental or phased;

(b) They are carried out by force or threat of force;

(c) They are involuntary, without the full informed consent of the affected population(s);

(d) They are deliberate on the part of the Government or other party conducting the transfer, with or without whose knowledge the violations occur;

(e) They are systematic, forming a pattern of policy or practice;

(f) They are discriminatory, affecting a distinct population or distinct populations; and

(g) They take place without due process.

11. The expert group identified the following as some of the circumstances in which population transfers occur:

(a) International armed conflicts;

(b) Internal armed conflicts, including civil war, insurrection or civil disobedience, whether or not involving a State actor;

(c) Deportations, expulsions or evictions under the guise of national security or other military imperative;

(d) Territorial changes, with or without population-exchange treaties;

(e) Demographic manipulation preceding or consequent upon the formation of a new State as part of the consolidation or integration of statehood, accompanied by measures aimed at either balancing population density or at ethnic homogenization, or separatist apartheid tendencies;

(f) Punitive transfers across a State border;

(g) Punitive transfers within a State border;

(h) Transfers purportedly for development or other public purposes;

(i) Induced degradation of the environment calculated to cause migration away from specific areas;

(j) Slavery or conditions of slavery, including forced or compulsory labour; and

(k) The implantation of settlers.

## II. POPULATION TRANSFERS AND THE VIOLATION OF HUMAN RIGHTS

12. The expert group affirmed the right to live and remain in one's homeland, i.e. the right not to be subjected to forcible displacement, as a fundamental human right and a prerequisite to the enjoyment of other rights. 1/ Reference was made to the extensive discussion of this issue at the session of the Institut de Droit international held at Siena, Italy, which had concluded that transfers of population entailed serious violations of human rights. 2/ Reference was also made to the statement by the former United Nations High Commissioner for Human Rights, Mr. José Ayala-Lasso, on 28 May 1995, in which he asserted that "the right not to be expelled from one's homeland is a fundamental human right", thus rejecting collective expulsions and "collective punishment on the basis of general discrimination".

13. It was determined that in this context, "homeland" refers to a distinct geographical location within the territory of a State. It is in this homeland or place of habitual residence that civil and political, economic, social and cultural rights are exercised. 3/ The expert group further observed that the right to one's homeland also encompasses other fundamental human rights principles, notably, the right to a nationality and the territorial locus of a population within a State. Consequently, the right to one's homeland may be

affected by certain territorial changes, as well as by the application of the doctrine of the succession of States in matters of nationality. The challenge is to ensure that this right is respected in all cases.

14. Collective expulsions or population transfers usually target national, ethnic, religious or linguistic minorities and thus, prima facie, violate individual as well as collective rights contained in several important international human rights instruments, in particular the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. Moreover, population transfers are incompatible with norms of "soft law" such as the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the draft Code of Crimes against the Peace and Security of Mankind, and certain resolutions adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, i.e. resolutions 1992/28, 1994/24, 1995/13, and 1996/9.

15. Specific rights which population transfers violate include the right to self-determination; the right to privacy, family life and home; the prohibition on forced labour; the right to work; the prohibition of arbitrary detention, including internment prior to expulsion; the right to nationality as well as the right of a child to a nationality; the right to property or peaceful enjoyment of possessions; the right to social security; and protection from incitement to racial hatred or religious intolerance (see the table at annex I).

16. The range of human rights violated by population transfer and the implantation of settlers place this phenomenon in the category of systematic or mass violations of human rights. The International Law Commission has declared that these practices constitute criminal acts. Thus, article 18 of the draft Code of Crimes against the Peace and Security of Mankind (adopted at the second reading in July 1996) classifies the forcible transfer of populations as a crime against humanity. Under article 20 of the Draft Code, unlawful deportation or transfer or unlawful confinement of protected persons and the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies constitute a crime against the peace and security of mankind when committed in a systematic manner or on a large scale. Articles 1-4 of the draft Code codify generally binding customary principles of international law as contained in the Nürnberg Charter and the Geneva Conventions. According to article 4, the Code provides for the criminal responsibility of individuals, but without prejudice to State responsibility. In this regard, it is important for the Sub-Commission to have regard to the work of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, 4/ whose jurisdiction include deportations, as well as the ongoing discussions in the International Law Commission aimed at the establishment of an International Criminal Court to punish the perpetrators of and prevent forcible population transfers. Indeed, the indictments against Mladko Radic and Radovan Karadzic encompass systematic deportations of the civilian population.

17. As explained above, population transfers violate the gamut of human rights and constitute an anachronism in the light of generally accepted United Nations norms. Nevertheless, they continue to occur. Regrettably, the

prohibition of the use of force contained in Article 2 (4) of the Charter of the United Nations has not stopped wars of aggression, nor has the jus cogens prohibition of torture made this scourge a thing of the past. The norms exist, however, and there are mechanisms to monitor their observance.

18. The discussion that follows in no way accepts, condones or comes to terms with the phenomenon of population transfers. It merely recognizes that it occurs and seeks to address some important legal issues that ensue.

## III. TERRITORIAL CHANGES AND POPULATION TRANSFERS

19. The phenomenon of population transfers is closely associated with political problems arising from the relation between territory and population. In this regard, the progress report (1994) made reference to the issue of territorial changes brought about by the dissolution and constitution of States and which lead to population transfer, and that the principle of uti possidetis, in combination with recognition by States, should provide a basis for the settlement of territorial disputes and the protection of populations against forcible transfer. Events since then, notably the 1995 Dayton Agreement, call for an examination of the effect of territorial changes on population transfer and the implantation of settlers.

20. As a starting point we must consider the principles of international law which govern the relation between population and territory, and attempt to apply them to the situation of population transfer. Traditional protection which international law provides to the stability of populations on State territory is based upon the principle that the population of a State has a territorial or local status. In a classic paragraph, a leading international lawyer encapsules the principle as follows:

> "The basic ideas would seem to be that belonging to a community is important and that a stable community is normally related to a particular territorial zone. In the normal case, territory, both socially and legally, connotes population, and to regard a population in the normal case, as related to particular areas of territory is to recognize a political reality which underlies modern territorial settlements." 5/

21. Underlying the territorial status of populations is the principle of nationality which expresses the genuine and effective link between territory and populations or individuals. These principles stand to be applied in the "normal case" where the relation between territory and population is stable, as illustrated by the above passage. However, in the "abnormal case" from which population transfer and the implantation of settlers result, these principles come under stress and their application is less than clear. What is clear is that the consequences of a violent rupture of the relation between territory and population and the resulting population transfers are addressed by other principles of international law, namely, the prohibition on expulsions and population transfers during armed conflict, and the protection owed to expelled or evicted populations as refugees, stateless persons or internally displaced persons.

22. In practice, there remains the problem of the effect of territorial changes on the status of populations. The crux of it consists in the transfer of defined parts of the populations and territories of existing multinational or multicultural States in order to constitute mono-ethnic or uninational and unicultural States. 6/ With regard to this state of affairs, the overriding principle in territorial settlements should clearly be that the population goes with the territory in order to ensure that territorial changes do not necessarily lead to population transfers, and that the resulting territorial changes reflect the status of the population in terms of its location and nationality. However, the proposition that the population goes with the territory has the effect of qualifying the application of rules relating to the acquisition of nationality and the prevention of statelessness, the application of human rights standards, the prohibition of population transfers during armed conflict, and the voluntary repatriation of refugees. 7/

23. There are important indications of how to deal with population transfer and the implantation of settlers which derive from the attempts made by the Commonwealth of Independent States with regard to the "deported peoples" following the dissolution of the Soviet Union. The Agreement reached by these States on "Deported Peoples"* (1992) 8/ unanimously condemned the then totalitarian policy of the forced resettlement of peoples, national minorities and individual citizens of the former Union of Soviet Socialist Republics. The Agreement also recognizes the necessity of undertaking the obligation to protect the legal interests of the deported peoples and to ensure their voluntary return to their places of residence prior to deportation. Even then, the issue of State succession and nationality remains a significant factor in this formula.

## IV. STATE SUCCESSION, NATIONALITY AND POPULATION TRANSFERS

24. State succession "arises when there is a definitive replacement of one State by another in respect of sovereignty over a given territory in conformity with international law". At the heart of this lie certain political events such as the "total dismemberment of an existing State, secession, decolonization of a part of a State, merger of existing States, and partial cession or annexation of State territory". 9/ It is common for the problem of population transfers and the implantation of settlers to appear in the context of the succession of States as in the cases of the former Yugoslavia and the former Soviet Union.

25. One of the basic problems of State succession in relation to population transfers is whether the inhabitants of a territory automatically become nationals of the successor State. Conversely, an emergent or new State may attempt to avoid the consequences of State succession in matters of nationality by forced population transfer, such as ethnic cleansing, and the implantation of settlers in the place of expelled population groups.

26. Divergent international legal opinions exist on this issue. Professor Brownlie's position remains most relevant to the contemporary problems of nationality, displacement and new States:

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* Unofficial translation of title.

"... in view of the rule that every State must have a determinate population (as an element of its statehood), and therefore nationality always has an international aspect, there is no very fundamental distinction between the issue of statehood and the transfer of territory ... the evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality". 10/

27. It follows that the discretion of a successor State in matters of nationality arising from the event of a transfer of territory and population is limited from the point of view of the special relation between territory and population. The doctrine of the effective and genuine link with territory, as stated by the International Court of Justice in the Nottebohm case", 11/ is based on this relationship, and thus nationality expresses the fact of social attachment with territory. The statement that the population follows a change in sovereignty reflects the principle of the territorial locus of the population, and that the population goes with territory. In an Advisory Opinion rendered in 1984, the Inter-American Court of Human Rights stated that the right to a nationality is an inherent human right recognized in international law and that the powers of States to regulate matters relating to nationality are circumscribed by their obligations to ensure the full protection of human rights. 12/

28. This approach to the issue of State succession and nationality underlies the draft European Convention on Nationality (1997). 13/ The commentary to the Convention acknowledges that "with the development of human rights law since the Second World War, there exists an increasing recognition that discretion in the field of nationality must further take into account the fundamental rights of individuals," 14/ and that given the considerable growth in the number of international instruments containing provisions on nationality, there is therefore a need to consolidate in a single text the new ideas which have emerged as a result of developments in national law and international law.

29. Of far-reaching importance is that the draft European Convention on Nationality has been motivated by the problems which emerged as a result of the political and territorial changes in Eastern and Western Europe since 1989. Crucially, the Convention prohibits, in its article 5, discriminatory rules on nationality on the grounds of sex, religion, race, colour, or national or ethnic origin and the objective in this regard is to enhance the protection to be given under the Framework Convention for the Protection of Minorities (1994). 15/ The draft European Convention on Nationality also addresses the issue of State succession and nationality in circumstances where a State is dissolved with a view to avoiding statelessness and giving protection to the rights of the persons habitually resident on the territories concerned.

30. In article 3, the draft Convention recognizes the competence of each State to determine under its own law who are its nationals, but that this law shall be recognized by other States insofar as it is consistent with applicable international conventions, customary international law and the principles of law generally recognized with regard to nationality. Article 4 goes on to proclaim the principles which provide a base for internal or

domestic rules on nationality. These include that: everyone has the right to a nationality; statelessness shall be avoided; and no one shall be arbitrarily deprived of his or her nationality.

31. The principles of the draft Convention governing State succession and nationality are enumerated in article 18 of the draft Convention, and these are of special importance to the problem of nationality in the context of forcible population transfers and the implantation of settlers. The provision reads:

> "1. In matters of nationality in cases of State succession, each State Party concerned shall respect the principles of the rule of law, the rules concerning human rights and the principles contained in Articles 4 and 5 of the present Convention and in paragraph 2 of this Article, in particular to avoid statelessness.
>
> "2. In deciding on the granting or the retention of nationality in cases of State succession, each State Party concerned shall take account in particular of:
>
> "a. the genuine and effective link of the person concerned with the State;
>
> "b. the habitual residence of the person concerned at the time of State succession;
>
> "c. the will of the person concerned;
>
> "d. the territorial origin of the person concerned."

32. The predominance of the relation between territory and population in a, b, and d is obvious, while c may be taken to reflect the right of option.

33. At the international level, the International Law Commission at its forty-fifth session in 1993, decided to include in its agenda the new topic of the question of State succession and its impact on the nationality of natural and legal persons. The work of the Commission on this subject is still at an early stage, but there is no doubt that it will be of very high significance to the problem at hand. The priority set by the Commission focuses on the question of the nationality of natural persons in situations of State succession and the Commission's Special Rapporteur, Mr. Vaclav Mikulka, proposed, in his first report (A/CN.4/467), to present a broad picture of State practice on the impact of State succession on nationality regarding different types of territorial changes, from the nineteenth century to the recent past, in all regions of the world.

34. In his report, Mr. Mikulka lays emphasis on the principle of a genuine and effective link as the basis for the determination of nationality after the dissolution of a State, but the result of the Commission's work is expected to take the form of a declaration of the General Assembly.

35. At the time of writing, the ILC drafting committee had adopted some 16 draft articles on nationality in relation to the succession of States.

The articles reflect the duty, now firmly established in international law, to prevent statelessness (art. 3). They presume - but subject to the provisions of the articles - that habitual residents of a territory affected by the succession of States to acquire the nationality of the successor State (although, according to some members of the Commission, such a presumption is rebuttable). In article 10 respect for the will of the persons concerned is provided for, i.e. a right of option within a reasonable time limit. Of particular significance is article 13 [10] which provides:

"1. The status of persons concerned as habitual residents shall not be affected by the succession of States.

"2. A State concerned shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto."

The obligation is further strengthened by article 14 [12] which stipulates that "States concerned shall not deny persons concerned the right to retain or acquire a nationality or the right of option upon the succession of States by discrimination on any ground".

36. It is noteworthy that although the draft declaration adopted by the expert seminar (annex II) embodies the major developments reflecting the impact of human rights on the discretion of States in matters of nationality, viz. the prevention of statelessness, the prevention of discrimination, the right of option, and the link to a homeland and therefore the resultant right of return, the fact that it is a mere declaration will somewhat limit its effectiveness. But international law-making is the art of the possible and given that the succession of States often takes place in circumstances that touch the crucial interests of States, it would be unrealistic to expect that stricter rules could be agreed upon.

## V. MILITARY NECESSITY

37. More pervasive on population transfers and the implantation of settlers is the impact of prolonged military occupation. Obvious examples are the Turkish occupation of northern Cyprus since 1964, and Territories occupied by Israel since 1967. Prolonged military occupation is incompatible with the prohibition on forcible mass population transfers and the implantation of settlers under article 49 of the Fourth Geneva Convention and the prohibition on the expulsion of the civilian population in article 17 of Additional Protocol II to the Geneva Conventions of 1949. These provisions make limited exceptions to this prohibition on the grounds of imperative military reasons, and the substance of these provisions has been the subject of the progress report (para. 74). Nevertheless, a contemporary point of difficulty is that prolonged military occupation tends to abuse these exceptions in such a way that demographic manipulation takes place through forcible transfers of populations and the implantation of settlers.

38. An example of the way in which military necessity can be used to justify dubious relocations of populations can be seen in the decision of the United States Supreme Court in the case of Korematsu v. United States 16/ in

which the majority of the Court agreed that military necessity justified the relocation of Japanese Americans during the Second World War. The Court held that the exclusion of persons of Japanese origin from the West Coast of the United States was necessary as a military imperative.

39. In a dissenting opinion, Justice Murphy warned of the consequences of relying upon military necessity as a basis for relocation. Justice Murphy held that the exclusion of all persons of Japanese ancestry, both alien and non-alien, from the Pacific Coast area on a plea of military necessity was tantamount to racism:

> "... At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruellest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow". 17/

This statement illustrates that there is a need to limit "military necessity"; Justice Murphy's forward-looking view that the unlimited recourse to the excuse of military necessity is to "encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow" has been borne out by the forced population transfers of today. This shows that there is a lacuna that should be addressed in order to enhance the prohibition against forcible population transfers and the implantation of settlers under humanitarian law, as concerns the validity of imperative military reasons or military necessity and limits to the duration of military occupation.

40. With respect to the former, the International Law Commission has stated that imperative military reasons do not justify transfers of population with the aim of altering the demographic composition of the territory concerned for political, racial or religious reasons or transfers involving the disguised intent to annex the territory. 18/ The Commission has also taken the position that the use of prohibited methods or means of warfare is not justified by military necessity. 19/ It stands to reason therefore that forcible population transfers and the implantation of settlers under article 49 of the Fourth Geneva Convention of 1949, as well as the expulsion of civilians under article 17 of Additional Protocol II, should not be justified by military necessity or imperative military reasons. A good line of reasoning on this matter is provided by the dissenting opinion of Judge Higgins in the case of the Legality of the Threat or Use of Nuclear Weapons before the International Court of Justice in which she called for a balance between necessity and humanity. The balance should clearly be weighed in favour of humanity. 20/

41. Insofar as the content of prolonged military occupation is concerned, a contextual reading of the Fourth Geneva Convention suggests that no specific limitation exists to the duration of military occupation. Under article 6 of the Fourth Geneva Convention, in the case of continuing occupation, "the

Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory" by, amongst others, the provisions of article 49.

42. The intention is that an Occupying Power should not avoid its obligations under article 49 for the duration of the occupation, but it is clear that the obligations in question are predicated on such a Power exercising the functions of government. What is not clear is whether "government" in this sense refers to a civilian or military government or both, and whether the protective purpose behind article 6 can be avoided by proclaiming a military administration instead of a military government. Whatever the case, an objective assessment of the character of occupation seems necessary. In Loizidou v. Turkey, 21/ Turkey sought to avoid responsibility for certain acts in Northern Cyprus by claiming that the territory in question was administered, militarily, by the Turkish Republic of Northern Cyprus (TRNC). The European Court of Human Rights noted that the responsibility of States under the European Convention on Human Rights can be involved by acts and omissions of their authorities which produce effects outside their own territory.

43. The Court referred to certain legal arrangements and transactions in a situation of occupation, for instance as regards the registration of births, deaths and marriages "the effects of which can be ignored only to the detriment of the inhabitants of the territory". It is obvious that this statement is relevant to situations of forcible population transfers and the implantation of settlers during military occupation. Acts which give effect to registration of births, deaths and marriages outside the territory of a State are taken to be evidence of government activity for the purposes of occupation under article 6 of the Fourth Geneva Convention.

44. Significantly, the Court held that the responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control over an area outside its national territory. Such control implies occupation, and the obligations under article 49 of the Fourth Geneva Convention cannot therefore be avoided under the guise of a military or other self-styled administration provided an Occupying Power exercises effective control in the territory in question.

45. Another problem related to prolonged military occupation involves the continuation of the policy of implanting settlers in the aftermath of a peace agreement underlying a territorial settlement which brings military occupation to an end. Such agreements cannot, by their nature, deal with this complex issue adequately or explicitly because they are often concluded in a political and military atmosphere in which the balance of power weighs heavily against the inhabitants of an occupied territory. 22/ The appropriate way of dealing with the problem is to look again at the Fourth Geneva Convention with a view to extending the prohibition on the implantation of settlers even after the general close of military or civilian operations in an occupied area. Indeed, it is not unreasonable to suggest that to the extent that agreements breach jus cogens rules this might constitute grounds for their invalidation.

46. This situation does not appear to be covered by articles 49 and 6 of the Fourth Geneva Convention. While the former absolutely prohibits the

implantation of settlers in occupied territories, the latter has the effect of extending this prohibition for the duration of the occupation. Beyond that, the application of the Fourth Geneva Convention shall continue but only for the benefit of protected persons whose release, repatriation or re-establishment may take place one year after the close of military operations, or for the duration of the occupation. This effectively leaves aside the problem of the implantation of settlers after military occupation is legally terminated, but where the Occupying Power still has the political and military capacity to continue the policy of implantation. Israel is a case in point.

47. Apart from this lacuna in humanitarian law (which can be remedied by the application of the doctrine of state responsibility with regard to breaches of jus cogens rules), it is apparent that assertive international diplomatic measures are required to ensure that territorial settlements which prohibit forcible transfers of population and the implantation of settlers are respected by the parties to the agreements. The failure to exert effective international pressure aimed at encouraging compliance with such agreements may have disastrous consequences such as a return to forcible measures, leading to further violence and the displacement of populations.

## VI. POPULATION TRANSFERS AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS

48. As noted in the preliminary report, population transfers and the implantation of settlers can be an intended or planned result in the pursuit of development, and that some clarification may still be needed as to the obligations of States in this matter. The main obligations which bear relevance to the situation of population transfers and the implantation of settlers under the guise of development may be derived from the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights, and those recognized by States in the Declaration on the Right to Development.

49. First of all, the Charter of the United Nations establishes the principle of the equality and self-determination of peoples generally. However, this principle has always been considered in relation to the political status, and the existence and identity of peoples. 23/ Exclusive reference to this aspect of self-determination ignores the fact that the International Covenant on Economic, Social and Cultural Rights extends the scope of the principle of self-determination to the sphere of economic development. In essence, approaches to the human rights dimensions of population transfer should include the indivisibility of civil and political rights and economic, social and cultural rights. It is not by legal accident that under article 1 of both Covenants, all peoples have the right to self-determination by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development, and that in no case may a people be deprived of its means of subsistence. Furthermore, the rights contained in the Covenants are underpinned by these principles and the guarantee of non-discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

50. In the context of population transfers, paragraph 2 of common article 1 is of particular relevance: "All peoples may, for their own ends, freely

dispose of their natural wealth and resources .... In no case may a people be deprived of its own means of subsistence". Indeed, expelling States sometimes deport peoples precisely in order to deprive them of their land, natural wealth and resources.

51. By these standards, it would appear that States are obliged to pursue economic development in ways which respect and accord with the will of the people. 24/ It has been held, in the context of development assistance rendered by the United Kingdom for purposes of constructing a dam in Malaysia, that such assistance was unlawful because it was not in the interest of the people of Malaysia. 25/ (Still such a determination should not be left to the courts of another State for that might constitute interference). The combined application of self-determination, equality and non-discrimination of any kind in the enjoyment of economic, social and cultural rights means that development, as a right of the people, must be pursued in the interest of all the people belonging to a State, and that the pursuit of development goals which have the effect of transferring selected or targeted sectors of the population without their consent, or demographic manipulation by implanting settlers, would be a breach of economic self-determination and the equality of peoples within a State.

52. It has been argued persuasively that for the purpose of self-determination, the meaning of the term "people" is context dependent. 26/ If this is true, and there is no reason why it shouldn't be, then a distinct sector of the population may be identified as a "people" by virtue of the discrimination levelled against it in the context of the denial of self-determination, and by being subjected to forcible transfer or removal from its normal place of location within the State. This effectively denies such groups their means of subsistence, contrary to the obligation arising from the right to self-determination.

53. Population transfers also directly violate specific economic, social, and cultural rights. Underlying the International Covenant on Economic, Social and Cultural Rights is the obligation of the States parties to take steps to ensure the enjoyment of these rights. The forced removal of populations by expulsion or eviction from their ordinary places of residence to uncertain modes of livelihood and adverse conditions of life prima facie violates this obligation where population transfers and the implantation of settlers is concerned.

54. Indeed, the Committee on Economic, Social and Cultural Rights has stated notably in its General Comment No. 4 on the right to adequate housing (see HRI/GEN/1/Rev.1), that instances of forced evictions are prima facie incompatible with the requirements of the International Covenant on Economic, Social and Cultural Rights. At its most recent session, in May 1997, the Committee adopted General Comment No. 7 on forced evictions, in which the Committee stated that "Forced eviction and house demolition as a punitive measure are also inconsistent with the norms of the Covenant. Likewise, the Committee [took] note of the obligations enshrined in the Geneva Conventions of 1949 and Protocols thereto of 1997 concerning prohibitions on the displacement of the civilian population and the destruction of private property as these related to the practice of forced evictions" (E/C.12/1997/4, para. 13). In addition to such violations, however, population transfers may

either be effected for the purpose, or have the effect, of avoiding the obligations relating to specific economic, social and cultural rights, namely, taking steps to ensure: (the right to an adequate standard of living for individuals and their families, including food, clothing and housing and the continuous improvement of living conditions (art. 11); the fundamental right of everyone to be free from hunger (art. 11.2); the right to enjoy the highest attainable standard of physical and mental health and medical care (art. 12); the right to work, especially as this includes the opportunity to gain a living by work and requires the State to take appropriate steps to safeguard it (art. 6); and the right to an education, particularly primary education which is compulsory (art. 13).

55. These rights are interrelated, such that the violation of one involves not only the violation of another, but also of civil and political rights. In the Committee's view, the right to housing, for example, should be seen as the right to live in security, peace and dignity, and that this right is integrally linked to other human rights contained in the two International Covenants, other international instruments, and the fundamental principles upon which the Covenant is premised.

56. The connection which exists between economic, social and cultural rights, and civil and political rights and which is useful to exploit in the context of human rights obligations in situations of population transfers can be seen in the observations made by the Committee on Economic Social and Cultural Rights with regard to the scope of the right to housing. In General Comment No. 4, paragraph 9, the Committee stated:

> "In addition [to the concept of human dignity and the principle of non-discrimination], the full enjoyment of other rights - such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making - is indispensable if the right to adequate housing is to be realized and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing."

57. This statement clearly applies to population transfers, including the implantation of settlers. It is apparent too that the right to housing and the others identified in this statement, as well as the ones enumerated by the experts at the seminar, are connected with the right to one's possessions and property.

58. But there seems to be an obvious causal connection between the denial, or erosion, of economic, social and cultural rights, and conditions leading to subtle and cumulative transfers of populations. Such conditions include economic degradation, the exclusion of specific population groups from enjoying the full quantum of economic benefits safeguarded by economic social and cultural rights, and the deliberate expulsion of certain groups by others in order to have access to the resources of those forcibly evicted by implanting settlers.

59. The causal link is most obvious when population transfers are affected by the direct use or threat of force. Yet artificially created stress can lead to the same result, such as when adversarial economic policies are targeted against a State. Unilateral or United Nations-imposed sanctions are a case in point. Whilst such policies have rarely led to a change of regime, they wreak havoc with the social and economic fabric of the targeted States, thereby causing large segments of their populations to leave. This phenomenon is accelerated when such groups are lured to a neighbouring State by the prospect of obtaining visas, albeit on an extremely selective basis to some States in the developed world. The boat people of Viet Nam and the large exodus from Ethiopia under Col. Mengistu are cases in point. More recent examples include the immigration of millions from the Islamic Republic of Iran and the continuous drain of the educated classes from Iraq.

## VII. REMEDIES

60. Population transfers engage both state responsibility and the criminal liability of individuals. Moreover, according to the principle ubi jus, ibi remedium (where there is a law, there is a remedy), it is important that certain remedies are available to the survivors and that victims of population transfers are entitled to appropriate remedies. The heading under which such remedies can be considered is restitutio in integrum which aims, as far as possible, at eliminating the consequences of the illegality associated with particular acts such as population transfer and the implantation of settlers. A crucial aspect of this involves the right to return to the homeland or the place of original occupation in order to restore the status quo and to reverse the consequences of illegality. This right is recognized, for example, in relation to Palestinians, in the Dayton Agreement, and Agreement on "Deported Peoples" of the Commonwealth of Independent States; it establishes a duty on the part of the State of origin to facilitate the return of expelled populations.

61. Restitutio in integrum would also involve the payment of compensation to the victims and survivors of population transfers. The Inter-American Court of Human Rights has stated that the compensation due to victims or their families must attempt to provide restitutio in integrum for the damages caused by the measure or situation that constituted a violation of human rights, and that the desired aim is full restitution for the injury suffered. The Court indicated that where this is impossible to achieve, it is appropriate to fix payment of fair compensation in sufficiently broad terms in order to compensate, to the extent possible, for the injury suffered. 27/

62. It follows that the responsibility to compensate upon lies with the party responsible for the act of population transfer. In the case involving the displacement of Miskito Indians, the Inter-American Court held that the Nicaraguan Government had not only to assist in the resettlement of displaced persons who wished to return to their former lands, but also to pay them adequate compensation for the loss of their property. 28/ The European Court of Human Rights has found Turkey to be responsible for the violation of the right to the peaceful possession or enjoyment of property by virtue of its occupation of northern Cyprus and required it to compensate the victims of such violations. 29/ In a case involving fighting between Turkish armed forces and Kurdish separatist guerrillas, the European Court of Human Rights

held that Turkey had violated the European Convention on Human Rights because its forces had destroyed the village of Kelekci in the south-east of the country in 1992 and 1993. The court found that the deliberate setting alight of the plaintiffs' houses was a grave violation of their right to respect of their family life, home and property. It ordered Turkey to pay the applicants a sum covering costs and expenses and recommended negotiations on further compensation. 30/

63. The problem of remedies summarized in the previous paragraphs was more fully dealt with in the progress report. What is important to emphasize here is that the suggestion that restitutio in integrum should not always be insisted on touches on the fundamental question of the innate antagonism between peace and justice. Obviously restitutio in integrum is the most just remedy because it seeks to wipe out the consequences of the original wrong. On the other hand, peace is ultimately an act of compromise. To put it differently, peace is by definition a non-principled solution reflecting the relative power of the conflicting parties, or simply the mere realization that no conflict, no matter how just it is perceived to be, can go on for ever. In reality, therefore, while the primacy of restitutio in integrum has to be continuously reaffirmed, most conflicts end with situations where some form of pecuniary compensation - sometimes in the form of development aid - is substituted for the right of return. Only time can tell whether such solutions will withstand the test of durability without which peace becomes a formal truce.

## VIII. CONCLUSIONS AND RECOMMENDATIONS OF THE EXPERT SEMINAR

### A. Conclusions

64. As affirmed in the Special Rapporteur's progress report, international law prohibits the transfer of persons, including the implantation of settlers, as a general principle, and the governing principle is that any displacement of populations must have the consent of the population involved. Accordingly, the criteria governing forcible transfer rest on the absence of consent and also include the use of force, coercive measures, and inducement to flee.

65. Acts such as ethnic cleansing, dispersal of minorities or ethnic populations from their homeland within or outside the State, and the implantation of settlers are unlawful, and engage State responsibility and the criminal responsibility of individuals.

66. Unlawful population transfer involves a practice or policy that has the purpose or effect of moving persons into or out of an area, whether within or across an international border, or into or out of an occupied territory, without the free and informed consent of the transferred population or any receiving population.

67. Such transfer may take the form of: involuntary or induced movement of persons with the purpose or effect of altering the demographic pattern in an area; involuntary or induced movement of persons on a discriminatory basis with regard to race, religion, origin, nationality or former nationality, linguistic or other cultural difference; mass migrations resulting from the creation of conditions of insecurity or disorder, or other adverse conditions,

for the purpose of, or resulting in such migration; and the forced movement of persons, whether citizens or aliens, without due process of law, notice, and the opportunity to be heard and represented before a judicial body.

68. In the context of development programmes, population transfers are lawful if they are non-discriminatory and are based upon the will of the people, and do not deprive a "people" of their means of subsistence. The general consent of the population sought to be transferred must be obtained by means of dialogue and negotiation with the elected representatives of the population on terms of equality, fairness and transparency, and equivalent land, housing, occupation and employment, in addition to adequate monetary compensation, must be provided. Moreover, such transfers are justified by the public interest. The doctrine of military necessity must be strictly construed, with the balance of probability weighed in favour of the protection of humanity.

69. The discretion of States in relation to State succession in matters of nationality must be limited in the case of population transfer by the principle of the territorial location or homeland, and the right to return must be respected in connection with this principle. Equally, the right to choose for those individuals or groups who do not wish to return must be respected. The remedies appropriate to situations of population transfers include restitutio in integrum, the right to return, compensation, and the rehabilitation of the survivors of population transfer. In particular, the right to return has been affirmed by the Sub-Commission in many resolutions. The Special Rapporteur notes with satisfaction that a number of States have recently offered expelled persons and their children the right to return and that the United Nations has provided assistance to States in repatriation schemes.

## B. Recommendations

70. Consideration must be given by the Sub-Commission to the possibility of preparing an international instrument to set or codify international standards which are applicable to the situation of population transfer and the implantation of settlers. Such an instrument should: provide for an express reaffirmation of the unlawfulness of population transfer and the implantation of settlers; define State responsibility in the matter of unlawful population transfer, including the implantation of settlers; provide for the criminal responsibility of individuals involved in population transfer, whether such individuals be private or officials of the State; provide machinery for deciding upon claims presented by the individuals or populations involved.

71. To this end, the Commission should adopt an instrument which embodies the principles of international law recognized by States as being applicable to population transfer and the implantation of settlers. For this purpose, a draft declaration, elaborated by the experts at the seminar, is appended for the consideration of the Sub-Commission (annex II).

72. The Sub-Commission should consider establishing a working group to monitor compliance with the declaration, in particular by developing early-warning and preventive mechanisms and coordinating advisory services and technical assistance, as required.

73. Other options are the elaboration of an additional protocol to the International Covenants on Human Rights, setting forth the right to one's homeland and the right to voluntary repatriation, or a Convention on the Prevention and Punishment of the Crime of Mass Expulsion.

74. The use of a flexible, investigative and monitoring process comparable to that established by ECOSOC resolution 1503 (XLVIII) should be examined in the context of population transfers, together with the existing regional machinery for the protection of human rights, including quasi-legal and political processes such as the Helsinki process, and the Mechanism for Conflict Prevention, Management and Resolution of the Organization of African Unity.

75. The Sub-Commission should look into the possibility of establishing an international trust fund for the rehabilitation of the survivors of population transfer.

## Notes

1/ Alfred de Zayas, "The right to one's homeland, ethnic cleansing and the International Criminal Tribunal for the Former Yugoslavia" Criminal Law Forum, vol. 6, No. 2, 1995, pp. 257-314.

2/ Annuaire de l'Institut de Droit International, vol. 44, No. 2, 1952, pp. 138 ff; Alfred de Zayas, "International law and mass population transfers" Harvard International Law Journal, vol. 16, No. 2, spring 1975, pp. 207-258. See also the International Legal Association Declaration of Principles of International Law on Mass Expulsions of 1986, principle 14 of which states "Compulsory transfer or exchange of population on the basis of race, religion, nationality of a particular social group or political opinion is inherently objectional, whether effected by treaties or by unilateral expulsion".

3/ J.M. Henckaerts, Mass Expulsion in Modern International Law and Practice, The Hague/Boston/London, Martinus Nijhoff, 1995; Christa Meindersma, "Legal issues surrounding population transfers in conflict situations", Netherlands International Law Review, vol. 41, No. 31, 1994, pp. 31-83; Joseph Schechla, "Ideological roots of population transfers", Third World Quarterly, vol. 14, No. 2, 1993, pp. 239-275.

4/ The Statute for the International Tribunal for the Former Yugoslavia is contained in Security Council document S/25704 and for Rwanda, in the annex to Council resolution 955 (1994).

5/ I. Brownlie, Principles of Public International Law, 4th ed., Oxford, 1990, p. 560.

6/ T. Franck, "Post-modern tribalism and the right to secession", in The Hague Academy III, 1993, pp. 125-149.

7/ Marjoleine Zieck, UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis, The Hague/Boston/London, Martinus Nijhoff, 1997.

8/ This agreement was signed by the heads of State of Armenia, Belarus, Kazakstan, Kyrgystan, the Republic of Moldova, the Russian Federation, Tajikistan, Turkmenistan, Ukraine and Uzbekistan. It has been ratified by Armenia (1993), Tajikistan (1993), Ukraine (1993) and Uzbekistan (1992).

9/ Brownlie, op. cit., p. 655 and chap. xxviii; D.P. O'Connel, State Succession in Municipal Law and International Law, Cambridge (UK), Cambridge University Press, 1967, chaps. 6 and 10.

10/ I. Brownlie, "The relations of nationality", British Yearbook of International Law, vol. 39, 1963, p. 320.

11/ I.C.J. Reports 1955, p. 23.

12/ Amendments to the Naturalization Provisions of the Constitution of Costa Rica, OC-4/84. For the text of the Opinion, see Human Rights Law Journal, vol. 5, 1984, p. 161.

13/ Council of Europe, Draft European Convention on Nationality and its Explanatory Report, Dir/Jur (97) 2, Strasbourg, 15 January 1997.

14/ Ibid., p. 23.

15/ ETS No. 157.

16/ 323 U.S. 214 (1944).

17/ Ibid.

18/ See Yearbook of the International Law Commission 1991, vol. II (A/CN.4/SER.A/1991/Add.1 (Part 2)).

19/ Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), p. 119.

20/ See Advisory Opinion of the International Court of Justice, Legality of the Threat or Use of Nuclear Weapons (UNGA), 8 July 1996.

21/ European Court of Human Rights Loizidou v. Turkey (Preliminary Objections) Judgement of 23 March 1995, Series A, No. 310, pp. 22-23; Loizidou v. Turkey (Merits) Judgement of 18 December 1996, pp. 15-18.

22/ J. Dempsey, "No place like home", Financial Times, 24-25 May 1997.

23/ See E/CN.4/Sub.2/1993/17, paras. 200-208.

24/ See in particular article 8 (2) of the Declaration on the Right to Development.

25/ R. v Secretary of State for Foreign and Commonwealth Affairs ex parte The World Development Movement, 10 ER 1995, p.611.

26/ J. Crawford, The Rights of Peoples, Oxford, 1988.

27/ Inter-American Court of Human Rights, Rodriguez v. Honduras, Compensatory Damages Judgement of 17 August 1990, p.90.

28/ Organization of American States, "Report on the situation of human rights of the Nicaraguan population of Miskito origin" (OAS/Ser.L/V/11/62), doc. 10, Rev.3, 1983, p. 21.

29/ See Loizidou v. Turkey (Merits), op.cit.

30/ European Court of Human Rights, Judgement of 19 September 1996.

ANNEX I

Human rights norms affected by population transfer and the implantation of settlers

| Right affected | Norm | Affected group | |
|---|---|---|---|
| | | Expellees | Population receiving settlers |
| Self-determination/ right to plebiscite | Art.1/CCPR; art.1/CESR | X | X |
| Right to remain (right to one's homeland) | Art.49, Fourth Geneva Convention; Art.17/Add. Protocol II | X | X |
| Prohibition of implantation of settlers | Art.49 Fourth Geneva Convention; Art.20 DCCPSM | | X |
| Equality and non-discrimination | Arts.2, 26/CCPR; Art.2/CESCR; CERD | X | X |
| Due process | Art. 14 (1)/CCPR | X | X |
| No arbitrary expulsion; individual determination of rights | Art. 13/CCPR | X | |
| No collective punishment | 42-56 Hague Regs.(1907) Geneva Conventions | X | X |
| Life Protection from genocide | Art. 6/CCPR CPPCG | X | X |
| Freedom of movement right to return | Art.12/CCPR | X | |
| Prohibition of exile | Art.9 UDHR | X | |
| Culture, identity, heritage (minorities); link to landscape (rural population) | Art.27 UDHR; Art.27/CCPR; Art.15/CESCR; ILO Convention No. 169; DRM | X | X |
| Torture, inhuman or degrading treatment (physical and mental anguish, psychological trauma, alienation) | Art.7/CCPR CAT | X | X |
| Privacy, family, home | Art.12 UDHR; Arts.17,23/CCPR Art.10/CESCR | X | |
| Prohibition of forced labour | Art.8/CCPR | X | |

ANNEX I (continued)

Human rights norms affected by population transfer and the implantation of settlers

| Right affected | Norm | Affected group | |
|---|---|---|---|
| | | Expellees | Population receiving settlers |
| Right to work | Arts.6,7/CESCR | X | |
| No arbitrary detention (pre-expulsion internment) | Art.9/CCPR | X | |
| Child's right to citizenship<br>Citizenship | Art.24(3)/CCPR<br>CRC<br>Art.15 UDHR<br>CRS<br>CERD | X<br><br>X | |
| Property | Art.17 UDHR<br>First Protocol ECHR | X | X |
| Social security | Art.22 UDHR<br>Art.9/CESCR | X | |
| Protection from incitement to racial hatred | Art.20/CCPR<br>Art.4 CERD | X | |
| Religion | Art.18/CCPR<br>Art.18 UDHR | X | |
| Freedom of expression, press | Art.19/CCPR<br>Art.19 UDHR | X | |
| Protection of children from traumatic experience of expulsion | Art.24/CCPR<br>CRC a/ | X | |
| Political activity | Art.25/CCPR | X | |
| Education | Art.13/CESCR | X | |
| Right to development | United Nations Charter/CESCR<br>DRD | X | X |
| Right to housing/prohibition of forced eviction | Art.10/CESCR b/ | X | X |

a/ Reference is also made to general comments 16 and 17 adopted by the Committee on the Rights of the Child.

b/ Reference is also made to general comments 4 and 7 adopted by the Committee on Economic, Social and Cultural Rights.

Abbreviations:

| | |
|---|---|
| CAT | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| CERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| CRC | Convention on the Rights of the Child |
| CRS | Convention on the Reduction of Statelessness |
| CPPCG | Convention on the Prevention and Punishment of the Crime of Genocide |
| DCCPSM | Draft Code of Crimes against the Peace and Security of Mankind |
| DRD | Declaration on the Right to Development |
| DRM | Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities |
| ECHR | European Convention on Human Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| UDHR | Universal Declaration of Human Rights |

ANNEX II

DRAFT DECLARATION ON POPULATION TRANSFER AND THE IMPLANTATION OF SETTLERS

Article 1

This Declaration sets standards which are applicable in all situations, including peacetime, disturbances and tensions, internal violence, internal armed conflict, mixed internal-international armed conflict, international armed conflict and public emergency situations. The norms contained in this Declaration must be respected under all circumstances.

Article 2

These norms shall be respected by, and are applicable to all persons, groups and authorities, irrespective of their legal status.

Article 3

Unlawful population transfers entail a practice or policy having the purpose or effect of moving persons into or out of an area, either within or across an international border, or within, into or out of an occupied territory, without the free and informed consent of the transferred population and any receiving population.

Article 4

1. Every person has the right to remain in peace, security and dignity in one's home, or on one's land and in one's country.

2. No person shall be compelled to leave his place of residence.

3. The displacement of the population or parts thereof shall not be ordered, induced or carried out unless their safety or imperative military reasons so demand. All persons thus displaced shall be allowed to return to their homes, lands, or places of origin immediately upon cessation of the conditions which made their displacement imperative.

Article 5

The settlement, by transfer or inducement, by the Occupying Power of parts of its own civilian population into the territory it occupies or by the Power exercising de facto control over a disputed territory is unlawful.

Article 6

Practices and polices having the purpose or effect of changing the demographic composition of the region in which a national, ethnic, linguistic, or other minority or an indigenous population is residing, whether by deportation, displacement, and/or the implantation of settlers, or a combination thereof, are unlawful.

Article 7

Population transfers or exchanges of population cannot be legalized by international agreement when they violate fundamental human rights norms or peremptory norms of international law.

Article 8

Every person has the right to return voluntarily, and in safety and dignity, to the country of origin and, within it, to the place of origin or choice. The exercise of the right to return does not preclude the victim's right to adequate remedies, including restoration of properties of which they were deprived in connection with or as a result of population transfers, compensation for any property that cannot be restored to them, and any other reparations provided for in international law.

Article 9

The above practices of population transfer constitute internationally wrongful acts giving rise to State responsibility and to individual criminal liability.

Article 10

Where acts or omissions prohibited in the present Declaration are committed, the international community as a whole and individual States, are under an obligation: (a) not to recognize as legal the situation created by such acts; (b) in ongoing situations, to ensure the immediate cessation of the act and the reversal of the harmful consequences; (c) not to render aid, assistance or support, financial or otherwise, to the State which has committed or is committing such act in the maintaining or strengthening of the situation created by such act.

Article 11

States shall adopt measures aimed at preventing the occurrence of population transfers and the implantation of settlers, including the prohibition of incitement to racial, religious or linguistic hatred.

Article 12

Nothing in these articles shall be construed as affecting the legal status of any authorities, groups or persons involved in situations of internal violence, disturbances, tensions or public emergency.

Article 13

1. Nothing in these articles shall be construed to restrict or impair the provisions of any international humanitarian or human rights instruments.

2. In case of different norms applicable to the same situation, the standard offering maximum protection to persons and groups subjected to population transfers, shall prevail.

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COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Forty-ninth session
Item 11 of the provisional agenda

# REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN OR MAY BE CONCERNED

Note by the Secretary-General

1. Pursuant to Sub-Commission resolution 5 (XIV), the present note reviews developments between 1 June 1996 and 1 June 1997 in fields with which the Sub-Commission has been previously concerned. It supplements those questions which are dealt with in the annotations to the provisional agenda for the forty-ninth session of the Sub-Commission (E/CN.4/Sub.2/1997/1/Add.1).

## I. INTERNATIONAL COVENANTS ON HUMAN RIGHTS

2. As at 1 June 1997, 136 States had ratified, acceded or succeeded to the International Covenant on Economic, Social and Cultural Rights. As at the same date 138 States had ratified, acceded or succeeded to the International Covenant on Civil and Political Rights and 92 States had ratified or acceded to the Optional Protocol to the latter. Additionally, 45 States had made the declaration envisaged under article 41, paragraph 1, of the International Covenant on Civil and Political Rights.

3. The Second Optional Protocol aiming at the abolition of the death penalty, which was adopted and opened for signature, ratification or accession by the General Assembly in resolution 44/128 of 15 December 1989, entered into force on 11 July 1991 in accordance with the provisions of its article 8. As at 1 June 1997, there were 30 States parties to that Protocol.

Committee on Economic, Social and Cultural Rights

4. At its fifteenth and sixteenth sessions, held in November-December 1996 and in April-May 1997 respectively, the Committee considered 10 reports submitted under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights.

5. During its fifteenth session, the Committee adopted a Programme of Action to strengthen the implementation of the International Covenant on Economic, Social and Cultural Rights, which is modelled after the High Commissioner's Plan of Action for the Implementation of the Convention on the Rights of the Child. The Committee called upon the Office of the High Commissioner, States parties and all other interested parties to support this Programme of Action.

6. Also during its fifteenth session, the Committee continued and concluded its consideration of a draft optional protocol providing for the right of individuals or groups to submit communications concerning non-compliance with the Covenant, as recommended by the World Conference on Human Rights (see E/C.12/1996/SR.44-49 and 54). The Committee presented a report on this matter to the Commission on Human Rights at its fifty-third session (E/CN.4/1997/105).

7. During its sixteenth session, the Commitee finalized and adopted General Comment No. 7 (1997) on "The right to adequate housing (art. 11 (1) of the Covenant): forced evictions". Additionally, the Committee established an informal, in-session working group to discuss the backlog of reports (24 reports are pending consideration) and a better focused dialogue with States parties.

8. Also during its sixteenth session, the Committee adopted a decision to send two of its members, Mr. Philippe Texier and Mr. Javier Wimer Zambrano, to visit the Dominican Republic and pursue the Committee's dialogue with the Government, to observe in situ the situation of economic, social and cultural rights and, in particular, focus on matters relating to the implementation of the right to housing. The Committee expressed its strong appreciation to the Government of the Dominican Republic for its willingness to cooperate with it. The mission is to take place from 19 to 27 September 1997. A report on the mission is to be submitted to the Committee at its seventeenth session.

9. The Committee also requested that appropriate action be taken by the Economic and Social Council in order to enable the Committee on Economic, Social and Cultural Rights to have an extraordinary session and pre-sessional working group in 1998; to hold its nineteenth regular session in New York; and to ensure that honorariums are paid to its members as is the case for members of the Human Rights Committee, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child. Additionally, the Committee requested that an extraordinary meeting of its pre-sessional working group be held immediately before its eighteenth session to discuss a number of draft general comments defining the contents of articles of the Covenant.

10. The Committee's report on its fourteenth and fifteenth sessions (E/1997/22-E/C.12/1996/6) will be submitted to the Economic and Social Council at its substantive session of 1997 in July.

Human Rights Committee

11. During its fifty-seventh, fifty-eighth and fifty-ninth sessions held in July, October-November 1996 and March-April 1997 respectively, the Committee considered 11 reports submitted by States parties under article 40 of the International Covenant on Civil and Political Rights, and two reports received pursuant to a special decision by the Committee.

12. At its fifty-seventh session the Committee adopted General Comment No. 25 (57) relating to article 25 of the Covenant (right to participate in the conduct of public affairs).

13. During the three sessions, the Committee also adopted 29 Views under article 5, paragraph 4, of the Optional Protocol to the Covenant, 16 decisions declaring complaints admissible and 10 decisions declaring complaints inadmissible.

14. A report on the Committee's fifty-fifth to fifty-seventh sessions was submitted to the General Assembly at its fifty-first session (A/51/40) and a report on its fifty-eighth to sixtieth sessions will be submitted to the General Assembly following the Committee's sixtieth session in July 1997.

Commission on Human Rights

15. The Commission, at its fifty-third session, adopted decision 1997/104 of 3 April 1997 concerning the status of the International Covenants on Human Rights. The Commission decided, inter alia, to request the Secretary-General to transmit the text of the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, contained in document E/CN.4/1997/105, to Governments and intergovernmental and non-governmental organizations for their comments for submission to the Commission on Human Rights at its fifty-fourth session.

16. In accordance with several General Assembly and Commission on Human Rights resolutions encouraging States to adhere to international human rights instruments and to comply with the reporting obligations therein and, to this end, to avail themselves of the assistance of the High Commissioner/Centre for Human Rights, the latter has planned to organize a second meeting on universal adherence to the principal international human rights instruments for countries from the Asian-Pacific region in Amman, in September 1997. (The first one was organized for countries from the African region in Addis Ababa from 14 to 17 May 1996.) In addition, seminars and training courses on reporting procedures are regularly organized under the fellowship programme of the High Commissioner/Centre for Human Rights in collaboration with the International Training Centre of the International Labour Organization. Thus a training course for countries from different regions was organized in Turin and a regional training course for Spanish-speaking countries was organized in Mar del Plata (Argentina), both in November 1996. Other training courses are

being organized or planned: one for English-speaking countries from the African region to be held in Addis Ababa in July 1997, one for French- and Portuguese-speaking countries from Africa to be held in Antananarivo in December 1997 and another one for Eastern European and Central Asian countries of the Commonwealth of Independent States to be held in Budapest, in October or November 1997. It may be noted that several country projects developed under the Programme of Advisory Services and Technical Assistance of the High Commissioner/Centre for Human Rights include national training courses on reporting obligations under international human rights instruments.

## II. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

17. At 1 June 1997, 148 States had adhered to the International Convention on the Elimination of All Forms of Racial Discrimination.

### Committee on the Elimination of Racial Discrimination

18. During its forty-ninth and fiftieth sessions, held in August 1996 and March 1997 respectively, the Committee considered reports submitted by 23 States parties to the Convention. Additionally, the Committee reviewed the application of the Convention in 19 States parties whose reports were seriously overdue. Under its early-warning and urgent procedures, the Committee adopted three decisions and one resolution at its forty-ninth session. With respect to communications under article 14 of the Convention, the Committee took no decisions. The Committee discussed the programme of action for the Third Decade to Combat Racism and Racial Discrimination at each session and, during a meeting between the bureaux of the Committee and the Sub-Commission on Prevention of Discrimination and Protection of Minorities at the forty-ninth session, it was decided to appoint experts from the respective bodies to draft a joint study on article 7 of the Convention on human rights education.

19. At its forty-ninth session, the Committee adopted General Recommendation XXII (49) on the application of article 5 to refugees and displaced persons.

### General Assembly

20. A report on the Committee's forty-eighth and forty-ninth sessions was submitted to the General Assembly at its fifty-first session (A/51/18) and a report on the Committee's fiftieth and fifty-first sessions will be submitted to the General Assembly at its fifty-second session following the Committee's fifty-first session in August 1997.

21. At its fifty-first session, the General Assembly adopted resolution 51/80 of 12 December 1996, concerning the report of the Committee on the Elimination of Racial Discrimination, in which it urged all States that had not yet ratified or acceded to the Convention to do so as soon as possible; strongly appealed to all States parties that were in arrears to fulfil their outstanding financial obligations under article 8, paragraph 6, of the Convention; commended the Committee for its contribution to the

prevention of racial discrimination, including early-warning measures and urgent procedures; welcomed the cooperation and exchange of information of the Committee with relevant structures and mechanisms of the United Nations and encouraged their continuation in the future, including with the High Commissioner for Human Rights of the United Nations. The Assembly also encouraged the use of innovative procedures by the Committee for reviewing the implementation of the Convention in States whose reports were seriously overdue and the formulating of concluding observations on reports of States parties to the Convention.

## III. CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

22. At 1 June 1997, the Convention had been ratified or acceded to by 102 States.

### Committee against Torture

23. At its seventeenth and eighteenth sessions, held in November 1996 and April-May 1997 respectively, the Committee against Torture considered 12 reports submitted to it under article 19 of the Convention and one special report requested by the Committee as a matter of urgency. It also continued in closed meeting its activities under articles 20 (inquiries) and 22 (individual communications) of the Convention. During its two sessions, the Committee took one decision declaring a communication inadmissible and adopted six Views under article 22 of the Convention. A report of the Committee's seventeenth and eighteenth sessions will be submitted to the General Assembly at its fifty-second session.

### Commission on Human Rights

24. The Commission, at its fifty-third session, adopted resolution 1997/38 of 11 April 1997, concerning torture and other cruel, inhuman or degrading treatment or punishment. In its resolution, the Commission, inter alia, urged all States to become parties to the Convention as a matter of priority; invited all States ratifying or acceding to the Convention and those States parties that had not yet done so to make the declaration provided for in articles 21 and 22 of the Convention and to consider the possibility of withdrawing their reservations to article 20; encouraged the States parties to notify the Secretary-General of their acceptance of the amendments to articles 17 and 18 of the Convention as soon as possible; and welcomed the work of the Committee against Torture and its practice of formulating concluding observations after the consideration of State party reports, as well as its practice of carrying out inquiries into cases where there were indications of the systematic practice of torture in States parties. Recommendations similar to those made by the Commission on Human Rights were adopted by the General Assembly in its resolution 51/86 of 12 December 1996.

## IV. CONVENTION ON THE RIGHTS OF THE CHILD

25. As of 1 June 1997, the Convention on the Rights of the Child had been ratified or acceded to by 190 States.

Committee on the Rights of the Child

26. At its thirteenth, fourteenth and fifteenth sessions, held in September-October 1996, January and May-June 1997 respectively, the Committee considered 18 reports submitted under article 44 of the Convention on the Rights of the Child.

27. During its fourteenth session the Committee decided to devote its one day of discussion to the issue of "the child and the media". Representatives of United Nations bodies, specialized agencies and other competent bodies, including non-governmental organizations, media representatives and research and academic organizations, contributed to the discussion and provided expert advice.

28. At its fourteenth session the Committee decided to devote its next thematic debate to the consideration of the rights of children with disabilities. This debate is scheduled to take place on 6 October 1997. A working group was established composed of Mrs. Karp, Mr. Kolosov and Ms. Mason, to prepare an outline for the discussion.

29. In November 1996 the Committee held its fifth informal meeting for two weeks in the northern African region. This meeting was organized in close cooperation with UNICEF, and was designed to ensure wider awareness of the Convention, as well as of the activities of the Committee.

30. In November 1996 the High Commissioner's Plan of Action to strengthen the implementation of the Convention on the Rights of the Child was finalized and sent to States parties to the Convention. Contributions from States have enabled HC/CHR to hire a team of five to assist the Committee members in the performance of their functions, including tasks of follow-up and technical assistance.

31. A meeting of States parties took place on 18 February 1997 at which elections were held. The new members of the Committee, whose term of office expires on 28 February 2001, are Mr. Francesco Paolo Fulci (Italy), Mrs. Nafsiah Mboi (Indonesia), Mrs. Esther Margaret Queen Mokhuane (South Africa) and Mr. Ghassan Salim Rabah (Lebanon). Two members having resigned, they were replaced by Mrs. Awa N'Deze Ouedraogo (Burkina Faso) and by Mrs. Lisbeth Palme (Sweden).

32. At its fifteenth session, six new members of the Committee made their solemn declaration. Also at this session one of the Committee members reported on a meeting of experts, held pursuant to ECOSOC resolution 1996/13, which met on 23-25 February 1997 in Vienna under the auspices of the United Nations Crime Prevention and Criminal Justice Division, to develop a programme of action to promote the effective use and application of international standards and norms in juvenile justice. The draft programme includes a proposal to establish a coordinating panel on technical advice and assistance in juvenile justice, which will consist of representatives of the Committee on the Rights of the Child, the High Commissioner/Centre for Human Rights, the Crime Prevention and Criminal Justice Division, UNICEF, UNDP and other relevant United Nations organizations and specialized agencies, as well as other interested intergovernmental and non-governmental organizations.

A member reported on a conference held in the Swedish Parliament on 28-29 May 1997 and on the adoption of the Stockholm Declaration. Another member reported on a conference held in Amsterdam on 26-27 February 1997 on child labour.

General Assembly

33. By its resolution 51/76 on the girl child, the General Assembly urged all States to take all necessary measures and to institute legal reforms to ensure the full and equal enjoyment by the girl child of all human rights and fundamental freedoms, and to take effective action against violations of those rights and freedoms. By its resolution 51/77 on the rights of the child, the Assembly focused on the protection of children affected by armed conflict, on refugee and internally displaced children, and on the prevention and eradication of the sale of children and of their sexual exploitation, including child prostitution and child pornography.

Commission on Human Rights

34. The Commission, at its fifty-third session, adopted resolution 1997/78 on the rights of the child. Among other things, the resolution noted the Plan of Action of the High Commissioner for Human Rights to strengthen the implementation of the Convention on the Rights of the Child, and focused on the girl child, the prevention and eradication of the sale of children and of their sexual exploitation, the protection of children affected by armed conflict, the problems of refugee and internally displaced children, the elimination of child labour, and the plight of street children. The Commission also requested the Secretary-General to appoint for a period of three years a special representative on the impact of armed conflict on children.

## V. EFFECTIVE IMPLEMENTATION OF INTERNATIONAL INSTRUMENTS ON HUMAN RIGHTS INCLUDING REPORTING OBLIGATIONS OF STATES PARTIES TO THE UNITED NATIONS INSTRUMENTS IN THE FIELD OF HUMAN RIGHTS

35. The persons chairing the human rights treaty bodies discussed issues relating to the effective implementation of international human rights instruments and the improvement of the operation of the relevant human rights treaty bodies at their seventh meeting which was held at the United Nations Office at Geneva from 16 to 20 September 1996. They submitted a report and their suggestions and recommendations to the General Assembly at its fifty-first session (A/51/482).

36. At its fifty-first session the General Assembly adopted resolution 51/87 of 12 December 1996 in which it, inter alia, welcomed the continuing efforts by the treaty bodies and the Secretary-General aimed at streamlining, rationalizing and otherwise improving reporting procedures; and requested the Secretary-General to prepare a detailed analytical study comparing the provisions of the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child

and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, with a view to identifying duplication of reporting required under these instruments.

37. The Commission on Human Rights at its fifty-third session adopted decision 1997/105 of 3 April 1997, entitled "Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights". It welcomed the final report of the independent expert on enhancing the long-term effectiveness of the United Nations human rights treaty system (E/CN.4/1997/74), and invited the Secretary-General to solicit the views of United Nations bodies, Governments, specialized agencies, intergovernmental and non-governmental organizations and interested persons on the report of the independent expert and to submit a report thereon, including the Secretary-General's own views on the legal, administrative and other implications of the report's recommendations, to the Commission on Human Rights at its fifty-fourth session.

## VI. INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

38. The Convention, which was adopted by the General Assembly in 1990, will enter into force when 20 States have ratified it. As at 1 June 1997, eight States (Bosnia and Herzegovina, Colombia, Egypt, Morocco, the Philippines, Seychelles, Sri Lanka and Uganda) had ratified or acceded to the Convention and two States (Chile and Mexico) had signed it.

39. In resolution 51/85 of 12 December 1996 the General Assembly, inter alia, called upon all Member States to consider signing and ratifying or acceding to the Convention as a matter of priority, and expressed the hope that the Convention would enter into force at an early date; requested the Secretary-General to provide all facilities and assistance necessary for the promotion of the Convention, through the World Public Information Campaign on Human Rights and the programme of advisory services in the field of human rights; and invited the organizations and agencies of the United Nations system and intergovernmental and non-governmental organizations to intensify their efforts with a view to disseminating information on and promoting understanding of the Convention.

40. The Commission on Human Rights, at its fifty-third session, adopted a similar resolution (1997/14 of 3 April 1997).

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